Supreme Court, U.S.
FILED
99 228 AUG 5 1999
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

RAMAH NAVAJO SCHOOL BOARD, INC., PATTERSON OIL CO., INC., and GUNDERSON OIL CO.,

Cross-Petitioners,

v.

NEW MEXICO TAXATION AND REVENUE DEPARTMENT,

Cross-Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW MEXICO COURT OF APPEALS

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

MICHAEL P. GROSS
Counsel of Record
LAW OFFICES OF MICHAEL P. GROSS
Attorneys for Cross-Petitioners
460 St. Michael's Drive
Suite 300
Santa Fe, New Mexico 87505
(505) 983-6686

ERIC TREISMAN
On the Brief

154268

Counsel Press LLC
FORMERLY LUTZ APPELLATE SERVICES
(800) 274-3321 • (800) 359-6859

23 pp

QUESTION PRESENTED

Does an Indian tribal governmental entity present a cognizable claim under 42 U.S.C. §§ 1983 and 1988 when its rights under The Indian Self-Determination And Education Assistance Act of 1975, 25 U.S.C. §§ 450-450n, have been violated by a State excise tax which deprived it of significant, measurable, and predictable financial resources appropriated by Congress for the express purpose of improving tribal education, health, and government?

PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

This conditional cross-petition is being filed solely on behalf of the Ramah Navajo School Board, Inc., a tribal governmental school board and sanctioned contractor of the Navajo Nation, a federally recognized Indian tribe. As counsel for Patterson Oil Co. and Gunderson Oil Co., the undersigned states that they have no interest in the outcome of this cross-petition.

OPINION BELOW

The Opinion of the New Mexico Court of Appeals is reported at 977 P.2d 1021 (N.M. Ct. App. 1999). It appears at Appendix ("App") 1 to Petitioner's Petition for Writ of Certiorari. The New Mexico Supreme Court's order denying review is reported at __ P.2d __ (N.M. 1999) and appears at App. 26 of the Petition for Writ of Certiorari. The New Mexico First Judicial District Court's summary judgment order is unreported and appears at App. 27 of the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The date of the judgment sought to be reviewed is March 4, 1999. On April 12, 1999, the New Mexico Supreme Court denied Cross-Petitioner's petition for certiorari. App. A. The Petition for Writ of Certiorari to this Court was docketed July 6, 1999. This Court has jurisdiction under 28 U.S.C. § 1257 and Rule 12.5 of the Rules of the Supreme Court of the United States.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent statutes involved are set out in the Petition. In addition, this case involves the Supremacy Clause, U.S. Const., Art. VI, Cl. 2, and The Civil Rights Act, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

And § 1988:

> In any action or proceeding to enforce a provision of section . . . 1983 . . . of this title . . . , the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

STATEMENT OF THE CASE

This is the latest round in multiple litigations over two decades in which the Ramah Navajo School Board, Inc. (RNSB) has resisted efforts by New Mexico state officials to impose state tax burdens on governmental services, primarily education, provided pursuant to the Indian Self- Determination and Educations Assistance Act of 1975, 25 U.S.C. §§ 450-450n, as amended ("ISDA") by RNSB to members of the Ramah Band of Navajo Indians. *See Ramah Navajo School Board v. Bureau of Revenue*, 458 U.S. 832, 102 S. Ct. 3394 (1982) ("*Ramah I*"); *Ramah Navajo School Board, Inc. v. Bureau of Revenue*, 104 NM 302, 720 P.2d 1243 (Ct. App. 1986), *cert. den.*, 479 U.S. 940 (1986) ("*Ramah II*").

Lacking oil wells and refineries, RNSB must purchase the fuel on which its programs depend from off-reservation sources. The sales take place on reservation. Purchase orders emanate from RNSB headquarters at Pine Hill on the Ramah Navajo Reservation for deliveries to storage tanks located on the Pine Hill school campus, usually within a day of the order being placed. A 1993 amendment to the New Mexico gasoline tax shifted the legal incidence from consumers on whom it had previously been fixed to wholesalers at the point of receipt from the refineries (Laws 1993, Ch. 32, § 2; reproduced as App. D of the Brief in Opposition). The amendment did not change any other aspect of the law and did not change the burden of the tax which remained on consumers. By this maneuver the state argued that no Indian activity was implicated in the taxable event, though it conceded the ultimate burden of the tax, some 17 cents per gallon, fell on RNSB. Until a 1998 amendment removed the discrepancy, the same law explicitly granted distributors the right to deduct from their tax liability the gasoline

products sold to federal agencies but not to Indian tribal entities. (App. C of the Brief in Opposition).

This action involves RNSB's claim for approximately $128,000. Included in the claims for relief was a claim for injunctive relief and attorney's fees under 42 U.S.C. §§ 1983 and 1988 (App. B and App. D), wherein John Chavez, the New Mexico Secretary for Taxation and Revenue, was sued in his personal and official capacity for violating the injunction entered after remain in *Ramah I*. Before receiving any factual submissions, the state district court granted a motion to dismiss these claims on grounds the New Mexico Tax Administration Act, 7-1-26 NMSA 1978, provided an adequate remedy. On appeal, the New Mexico Court of Appeals affirmed the dismissal of the civil rights claim. (Pet. App. 2) RNSB's petition for writ of certiorari to the New Mexico Supreme Court to review this decision was denied. (App. A).

REASONS FOR GRANTING THE WRIT

In light of *Ramah I, Ramah II,* Supreme Court decisions including *Will v. Michigan Dept. of State Police*, 491 U.S. 58, 109 S. Ct. 2304 fn. 10, and the subsequent New Mexico decision of *Dunn v. McFeeley et al.*, 1999-NMCA-084, Vol. 38 No. 27 Bar Bulletin 18, __ P.2d __, the applicability of federal civil rights remedies was wrongly determined below. Left to stand, the decision vitiates and confuses federal civil rights standards.

ISDA is a response to the longstanding oppression of the Indian minority, described in the President's transmittal to Congress as "the most deprived and most isolated minority group in our nation." Nixon to Congress, 1970 Journal of the House of Representations 721-725 (July 8, 1970). The transmittal speaks of "the heritage of centuries of injustice . . . The American Indians have been oppressed and brutalized, deprived of their ancestral lands and denied the opportunity to control their own destiny." Under ISDA, "locally administered programs would be funded on equal terms with similar services

still administered by Federal authorities." Nixon letter at 722. *Ramah II* holds that ISDA creates rights protected under 42 U.S.C. §§ 1983 and 1988 for their vindication.

The gasoline tax here is complementary to the gross receipts tax which was the subject of *Ramah I*. Transactions subject to the gas tax are exempted from the gross receipts tax. 7-9-26, NMSA 1978 (1998 Repl. Pam.) (App. F). The attempted application of the gas tax affecting Indian tribal ISDA contractors is governed by precisely the same legal considerations as the gross receipts tax sought to be imposed on a reservation construction project in *Ramah I*. Indeed, RNSB intends to show the gasoline subjected to the state tax was in part used in ongoing construction activities governed by the injunction in *Ramah I*, such that enforcement actions by Secretary Chavez constituted a *de facto* circumvention of the decision. (App. E).

National Private Truck Council, Inc. v. Oklahoma Tax Comm'n, 115 S. Ct. 2351 (1995), holding that where a state provides an adequate remedy at law the civil rights act does not apply, is cited below for the holding that *Ramah II* no longer applies to the tax commissioner. But, *National Private Truck* makes an exception, at 115 S. Ct. 2357, fn. 6, for a repeated course of conduct by state tax authorities which requires equitable relief. Here, the tax commissioner's conduct is essentially that prohibited by *Ramah I* and the allegations by RNSB in the Amended Complaint and Injunction (Apps. B-E) fit the exception. Although the deduction for sales to federal agencies has now been extended to Indian tribes (see App. C of Brief in Opposition), the Amended Complaint is fairly read to allege repeated and threatened conduct to impose further indirect excise taxes on the self-determination activities of the cross-petitioner.

Regardless of whether or not footnote 6 applies, *National Private Truck* did not involve core governmental functions of an Indian tribal organization to which comity is owned. Here

only tribal governmental functions are involved. The simple bright line test is inappropriate in such a situation. *National Private Truck* does not overrule *Ramah I*. The same distinctions which resulted in the radically opposite decisions in the same term, those in *Ramah I* and *United States v. New Mexico*, 455 U.S. 720 (1982), both involving the gross receipts tax, compel reversal of the ruling below. In essence, three statutes — ISDA, § 1983, and the Tax Injunction Act, 28 U.S.C. § 1341, together with its Court-fashioned extension — must be construed together.

Before dismissing the civil rights claim on the pleadings, the court should have considered whether Plaintiff was entitled to relief under any state of facts provable under the claim. *Dunn v. McFeeley, et al.* The court below did not do this and should not have dismissed on the pleadings.

Finally, although the main reason cited by the New Mexico Court of Appeals for denying RNSB's civil rights act claim is the purported adequacy of the New Mexico tax refund remedy in the N.M. Tax Administration Act, that remedy does not provide recovery of attorney's fees. Were this Court to grant certiorari to the Tax Department and not grant certiorari to RNSB, the cost to the tribe of obtaining and protecting its recovery would predictably wipe out the benefit, which thoroughly frustrates the federal scheme and purpose of ISDA, just as the underlying tax complained of did. *See Xerox Corp. v. County of Harris*, 459 U.S. 145 (1982); *Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979), 99 S. Ct. 802 (1979); *Nash v. Florida Industrial Comm'n*, 389 U.S. 235, 88 S. Ct. 362 (1967); *Hines v. Davidowitz*, 85 L. Ed. 581, 312 U.S. 52 (1941).

Thus, if certiorari is granted to the Petitioner, this conditional petition for writ for certiorari should also be granted in the interests of fundamental justice.

CONCLUSION

For the foregoing reasons, the Conditional Cross Petition for Writ of Certiorari should be granted.

Respectfully submitted,

MICHAEL P. GROSS
Counsel of Record
LAW OFFICES OF MICHAEL P. GROSS
Attorneys for Cross-Petitioners
460 St. Michael's Drive
Suite 300
Santa Fe, New Mexico 87505
(505) 983-6686

ERIC TREISMAN
On the Brief

APPENDIX

APPENDIX A — ORDER DENYING PETITION FOR WRIT OF CERTIORARI IN THE SUPREME COURT OF THE STATE OF NEW MEXICO NO. 25,671 DATED APRIL 12, 1999

IN THE SUPREME COURT OF THE STATE OF NEW MEXICO
Monday, April 12, 1999

No. 25,671

RAMAH NAVAJO SCHOOL BOARD, INC., a Navajo Tribal Organization and School Board, **PATTERSON OIL CO., INC.**, a New Mexico for profit corporation, and **GUNDERSON OIL CO., INC.**, a New Mexico for profit corporation,

Plaintiffs-Petitioners,

vs.

NEW MEXICO TAXATION & REVENUE DEPARTMENT, a State Agency, and **JOHN CHAVEZ,** individually and as Secretary of the New Mexico Taxation and Revenue Department,

Defendants-Respondents.

ORDER

This matter coming on for consideration by the Court upon petition for writ of certiorari, and the Court having considered said petition, and being sufficiently advised;

Appendix A

NOW, THEREFORE, IT IS ORDERED that petition for writ of certiorari is **denied** in Court of Appeals number **18909.**

ATTEST: A True Copy

KATHLEEN JO GIBSON
CLERK OF THE SUPREME COURT

By s/ Jane Gurruli
Chief Deputy

APPENDIX B — AMENDED COMPLAINT FOR REFUND OF TAXES, DECLARATORY JUDGMENT AND INJUNCTION *RNSB v. NM TAXATION & REVENUE DEPARTMENT, et al.* Civil No. SF 96-1623(C)

FIRST JUDICIAL DISTRICT COURT
STATE OF NEW MEXICO
COUNTY OF SANTA FE

ENDORSED JUL 9 1996

CIVIL NO. SF 06-1623(C)

RAMAH NAVAJO SCHOOL BOARD, INC., A Navajo Tribal Organization and School Board; PATTERSON OIL CO., INC., A New Mexico for Profit corporation; and GUNDERSON OIL CO., INC., a New Mexico for profit corporation,

PLAINTIFFS,

VS.

NEW MEXICO TAXATION & REVENUE DEPARTMENT, A State Agency; and JOHN CHAVEZ, Individually and as Secretary of the New Mexico Taxation & Revenue Department,

DEFENDANTS.

AMENDED COMPLAINT FOR REFUND OF TAXES, DECLARATORY JUDGMENT AND INUNCTION

Appendix B

COUNT I

Pursuant to the New Mexico Tax Administration Act, NMSA 1978, § 7-1-26, Plaintiffs seek judgement from this Court for refund of gasoline taxes illegally collected under color of the Gasoline Tax Act, NMSA 1978, §§ 7-13-1 *et seq.* Since 1993, and a declaratory judgment and injunction barring future assessments of gasoline taxes, and allege and represent the following:

. . .

COUNT II

17. Plaintiffs incorporate the allegations of Count I by reference.

18. The imposition of the taxes in question violates New Mexico's Constitutional disclaimer of jurisdiction over Indian lands, N.M. Const., Art. XXI, § 2, which was incorporated and made a condition of the Act of Congress approving entry of New Mexico into the Union, Act of June 20, 1910, 36 Stat. 557, ch. 310. Further, each of the acts of the Defendants alleged in this Complaint was performed or carried out under color of State law in violation of 42 U.S.C. § 1983 pursuant to State policy. Defendants therefore owe Plaintiffs $125,694.17 plus interest and such further amounts as may be assessed and collected by them during the pendency of this suit.

WHEREFORE, Plaintiffs respectfully pray for judgment reversing the decision of the defendants and awarding them

$125,694.17, plus interest and such additional amounts paid during the pendency of this law suit, for costs of this action including reasonable attorney's fees, and such further relief as the Court deems just and meet.

. . .

WHEREFORE, Plaintiffs further demand repayment of all taxes which they may pay under color of the New Mexico Gasoline Tax Act during the pendency of this action; for declaratory judgment under NMSA 1978, § 44-6-2, declaring that Defendants have no jurisdiction to collect this tax from Plaintiffs; pray that the Court grant a permanent injunction enjoining Defendants not to assess, impose or collect these taxes in future; and additionally pray for such other relief, including costs, reasonable attorney's fees, and other relief as the Court deems just and meet.

ROTH, VANAMBERG, GROSS,
ROGERS & ORTIZ

BY s/ Michael P. Gross
Michael P. Gross
347 East Palace Avenue
Post Office Box 1447
Santa Fe, New Mexico 87504-1447
(505) 988-8979

APPENDIX C — ORDER GRANTING LEAVE TO AMEND COMPLAINT *RNSB v. NM TAXATION & REVENUE DEPARTMENT, et al.*, Civil No. SF 96-1623(C)

FIRST JUDICIAL DISTRICT COURT
SANTA OF NEW MEXICO
COUNTY OF SANTA FE

ENDORSED JUL 23 1996

NO. SF 96-1623 (C)

RAMAH NAVAJO SCHOOL BOARD, INC., a Navajo Tribal Organization and School Board; **PATTERSON OIL CO., INC.,** a New Mexico for profit corporation; and **GUNDERSON OIL CO., INC.,** a New Mexico for profit corporation,

Plaintiffs,

-vs-

NEW MEXICO TAXATION & REVENUE DEPARTMENT, a State Agency; and **JOHN CHAVEZ,** individually and as Secretary of the New Mexico Taxation & Revenue Department.

Defendants.

ORDER GRANTING LEAVE TO AMEND COMPLAINT AND EXTEND TIME FOR RESPONDING TO MOTION TO DISMISS

Appendix C

THIS MATTER came before the Court on Plaintiffs' uncontested motion to amend their complaint and extend the time for responding to Defendants' Motion to Dismiss county II, III and IV. The Court being advised in the premises,

IT IS HEREBY ORDERED that:

1. Plaintiffs' motion to amend Court IV in their complaint by interlineation as per Exhibit 1 to their motion is hereby granted and the amended complaint is hereby deemed filed as of the date of filing of this Order.

2. Defendants shall be deemed to have denied the allegations of the amended complaint and there shall be no need for supplemental answer . . .

s/ Steve Herrera
DISTRICT JUDGE

APPENDIX D — AMENDMENT TO COUNT IV OF FIRST AMENDED COMPLAINT *RNSB v. NM TAXATION & REVENUE DEPARTMENT, et al.*, Civil No. SF 96-1623(C) DEEMED FILED JULY 23, 1996

FIRST JUDICIAL DISTRICT COURT
SANTA OF NEW MEXICO
COUNTY OF SANTA FE

NO. SF 96-1623 (C)

RAMAH NAVAJO SCHOOL BOARD, INC., a Navajo Tribal Organization and School Board; **PATTERSON OIL CO., INC.,** a New Mexico for profit corporation; and **GUNDERSON OIL CO., INC.,** a New Mexico for profit corporation,

Plaintiffs,

-vs-

NEW MEXICO TAXATION & REVENUE DEPARTMENT, a State Agency; and **JOHN CHAVEZ,** individually and as Secretary of the New Mexico Taxation & Revenue Department.

Defendants.

AMENDMENT TO COUNT IV OF FIRST AMENDED COMPLAINT

. . .

29. On mandate, this court in CV 78-438 issued an order permanently enjoining imposition of the gross receipts

tax or successor statute on the Ramah Navajo School Board, Inc.'s construction project. A copy of this Order is attached to this amended complaint.

30. This Court should declare that the mandate of the United States Supreme Court reaches and applies to the operation of the Ramah Navajo School Board, Inc.'s school and related programs and should consequently enjoin the imposition of the gasoline tax for the same reason.

31. This Court should permanently enjoin Defendants from assessing, imposing, or collecting the Gasoline Tax, the Gross Receipts Tax or any similar tax on vendors to the Ramah Navajo School Board, Inc., and should award attorney's fees under 42 U.S.C. § 1988.

WHEREFORE, Plaintiffs pray for repayment of all taxes which they have paid or in future may pay under color of the New Mexico Gasoline Tax Act during the pendency of this action; for declaratory judgment under NMSA 1978, § 44-6-1, declaring that Defendants have no jurisdiction to collect this tax from Plaintiffs because of the burdens imposed on the realization of the federal scheme for tribal self-sufficiency in education and related fields and declaring that the imposition of the gasoline tax violates the U.S. Supreme Court's mandate in CV 78-438; pray that the Court grant a permanent injunction enjoining Defendants from assessing, imposing or collecting this or any similar tax in future; and pray for such other relief, including costs, reasonable attorney's fees, and other relief as the Court deems just and meet.

Appendix D

Respectfully submitted:

ROTH, VANAMBERG, GROSS,
ROGERS & ORTIZ
347 East Palace Avenue
Post Office Box 1447
Santa Fe, NM 87504-1447
(505) 988-8979

By: s/ Michael P. Gross
Michael P. Gross

Counsel for Plaintiffs

APPENDIX E — ORDER ON REMAND *RNSB v. NM TAXATION & REVENUE DEPARTMENT, et al.*, Civil No. SF 96-1623(C) FILED OCTOBER 18, 1982

STATE OF NEW MEXICO COUNTY OF SANTA FE
IN THE DISTRICT COURT
FIRST JUDICIAL DISTRICT

No. 78-438

RAMAH NAVAJO SCHOOL BOARD, INC. and LEMBKE CONSTRUCTION COMPANY, INC.,

Petitioners,

BUREAU OF REVENUE, STATE OF NEW MEXICO,

Respondent.

ORDER

This matter comes before the Court on the Mandate of the Court of Appeals of New Mexico and the Mandate of the Supreme Court of the United States, the Court being advised in the premises and counsel for all parties having consented hereto, IT IS HEREBY ORDERED, ADJUDGED AND DECREED THAT:

The judgment of this case entered September 6, 1979, be and hereby is vacated:

Respondent shall pay to Petitioners the sum of $368,174.92 representing principal and accrued interest through August 25, 1982 as provided by law on account of

taxes found to have been illegally assessed by respondent upon Petitioner, Lembke Construction Company, Inc., judgment interest to run on this amount from date of entry of this order until paid;

Respondent shall refrain from imposing any taxes under the New Mexico Gross Receipts and Compensating Tax Act, § 7-9-1 et seq. NMSA 1978, or successor statutes, upon any proceeds received or payments made by either of the Petitioners or their successors in connection withe the Ramah Navajo School construction project;

Petitioners reserve and retain all rights to apply for attorney's fees and costs as may be provided by law.

This decree shall not be considered a final judgment for any purpose until this court disposes of any application for attorney's fees and costs filed herein, whereupon said fee disposition order shall merge with the instant decree and together with the provisions hereof become the final judgment in this action.

s/ Petra Jimenez Maes
District Judge

APPENDIX F — 7-9-26 NMSA 1978 (1998 REPL. PAMP.)

7-9-26. Exemption; gross receipts and compensating tax; fuel.

Exempted from the gross receipts and compensating tax are the receipts from selling and the use of gasoline, special fuel or alternative fuel on which the tax impose by Section 7-13-3, 7-16-3 or 7-16A-3 NMSA 1978 or the Alternative Fuel Tax Act [7-16B-1 to 7-16B-10 NMSA 1978] has been paid and not refunded.